

§ 295.5

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the FOIA, 32 CFR part 285 and 32 CFR part 286, or this part.

(b) *Initial Denial Authority (IDA)*. The official who has been granted authority to withhold records requested under the FOIA, for one or more of the nine categories of records exempt from mandatory disclosure, by the head of the OIG Component designated by the IG to administer the IG FOIA Program.

(c) *Appellate Authority*. The IG or his or her designee having jurisdiction for this purpose over the record.

(d) *Administrative Appeal*. A request by a member of the general public, made under the FOIA, asking the appellate authority of the OIG to reverse an IDA decision to withhold all or part of a requested record or an IDA decision to deny a request for waiver or reduction of fees.

(e) *Public Interest*. Public interest is official information that sheds light on an agency's performance of its statutory duties because the information falls within the statutory purpose of the FOIA of informing citizens about what their Government is doing. That statutory purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files that reveals little or nothing about an agency's or official's own conduct.

§ 295.5 Policy.

(a) *General*. (1) It is the policy of the OIG to promote public trust by conducting its activities in an open manner, and by providing the public with the maximum amount of accurate and timely information concerning those activities, consistent with the need for security and adherence to other requirements of law and regulation.

(2) Records not specifically exempt from disclosure under the FOIA or prohibited by statutory or other regulatory requirements will, upon request, be made readily accessible to the public.

(3) Records that are specifically exempt from disclosure under the FOIA or prohibited by statutory or other regulatory requirements will be withheld from the public only upon the determination of the initial Denial Authorities identified in § 295.6 of this part, or the designated Appellate Authority.

(b) *News Media Requests*. (1) Requests from news media representatives for records that would not be withheld if requested under the FOIA or prohibited from release under other statutory or regulatory authority, will be released promptly by the OIG element originating the record.

(2) Requests from news media representatives for records that are exempt from release under the FOIA, or prohibited from release under other statutory or regulatory authority will be provided to the Freedom of Information Act and Privacy Act (FOIA/PA) Division, Office of the Assistant Inspector General for Investigations, along with the requested records, for review and a release determination and the news media representatives will be so advised.

(3) Extracts of the nonexempt portions of such records may be prepared in response to a specific request from a news media representative but shall be coordinated for release with the FOIA/PA Division. Extracts shall be prepared in accordance with the sample at appendix to § 295.5.

(c) *Control System*. (1) A request for OIG records that invokes the FOIA shall enter a formal control system designed to ensure compliance with the FOIA. A release determination must be made and the requester informed within the time limits specified in this part.

(2) Any request for OIG records that either explicitly or implicitly cites the FOIA will be processed under the provisions set forth in this part, unless otherwise required by § 295.5(m) of this part. All such requests shall be forwarded to the FOIA/PA Division.

(d) *Promptness of Response*. (1) A request from a member of the public for OIG records will be responded to within 10 working days of the date of its receipt in the FOIA/PA Division, unless a delay is authorized.

(2) Receipt of the request will be acknowledged and the requester will be promptly advised of any additional information needed to assure compliance with procedures established in this part. In the event there are a significant number of requests, e.g., 10 or more, the requests will be processed in order of date of receipt. This does not

preclude the OIG from completing action on a request which can be easily answered, regardless of its ranking within the order of receipt. The OIG may expedite action on a request regardless of its ranking within the order of receipt upon a showing of exceptional need or urgency. Exceptional need will be determined at the discretion of the OIG.

(3) These provisions also apply to a request received on referral from another DoD Component or government agency and time limits will begin on the date of receipt in the OIG FOIA/PA Division.

(e) *Use of Exemptions.* It is OIG policy to make records publicly available unless they qualify for exemption under one or more of the nine exemptions. The OIG may elect to make a discretionary release, however, a discretionary release is generally not appropriate for records exempt under exemptions (b)(1), (b)(3), (b)(4), (b)(6) and (b)(7)(C). Exemptions (b)(4), (b)(6) and (b)(7)(C) can not be claimed when the requester is the submitter of the information. The categories of records which are exempt from release are identified in appendix B of this part.

(f) *For Official Use Only (FOUO).* The use of FOUO markings will be accomplished in accordance with the provisions of appendix A of this part, and exemptions (b)(2) through (b)(9) as set forth in appendix B of this part. Additional guidance will be provided to OIG elements, as needed, by the FOIA/PA Division.

(g) *Public Domain.* Nonexempt records released under the authority of this part are considered to be in the public domain. Such records may also be made available in the OIG Reading Room located in the FOIA/PA Division. Exempt records released pursuant to this part or other statutory or regulatory authority, however, may be considered to be in the public domain only when their release constitutes a waiver of the FOIA exemption. When the release does not constitute such a waiver, such as when disclosure is made to a properly constituted advisory committee or to a Congressional Committee, or to an individual to whom the record pertains, the released records do not lose their exempt sta-

tus. Also, while authority may exist to disclose records to individuals in their official capacity, the provisions of this part apply if the same individual seeks to use the records in a private or personal capacity.

(h) *Creation of Records.* (1) A record must exist and be in the possession or control of the OIG at the time of the request to be considered subject to release under this part and the FOIA. Mere possession of a record does not presume OIG control and such records, or identifiable portions thereof, will be referred to the originating agency for a release determination and/or direct response to the requester. There is no obligation to create nor compile a record to satisfy a FOIA request; however, the OIG may compile a new record when doing so would result in a more useful response to the requester, or be less burdensome to the OIG than providing the existing records, and the requester does not object. The cost of creating or compiling such a record will not be charged to the requester unless the fee is equal to, or less than, the fee that would be charged for providing the existing record. Any fee assessments will be made in accordance with chapter IV of DoD 5400.7-R (32 CFR part 286).

(2) With respect to electronic data, the issue of whether records are actually created or merely extracted from an existing database is not always readily apparent. Consequently, when responding to FOIA requests for electronic data where creation of a record, programming, or particular format are questionable, the OIG will apply a standard of reasonableness. In other words, if the capability exists to respond to the request, and the effort would be a business as usual approach, then the request will be processed. However, the request will not be processed where the capability to respond does not exist without a significant expenditure of resources, thus not be a normal business as usual approach.

(i) *Describing Records Sought.* (1) It is the responsibility of the member of the public requesting records to adequately identify the records. A member of the public must describe the records sought with sufficient information to permit the OIG to locate the records with a reasonable amount of effort,

since the FOIA does not authorize “fishing expeditions.” Descriptive information about a record may be divided into two broad categories:

(i) Category I is file-related and includes information such as type of record (for example, memorandum), title, index citation, subject area, date the record was created, and originator.

(ii) Category II is event-related and includes the circumstances that resulted in the record being created or the date and circumstances surrounding the event the record covers.

(2) When the OIG receives a request that does not “reasonably describe” the requested record with sufficient Category I information to permit the conduct of an organized nonrandom search, or sufficient Category II information to permit inference of the Category I elements needed to conduct such a search, the requester will be notified in writing of the defect and of the need for more specific identification of the records sought. The specificity letter will provide guidance in identifying the records sought and in reformulating the request to reduce the burden on the OIG in complying with the FOIA. The OIG is not obligated to act on requests until an adequate description is provided by the requester.

(3) When the OIG receives a request in which only personal identifiers, e.g., name and Social Security Account Number, are provided in connection with the request for records concerning the requester, only records retrievable by personal identifiers will be searched. The search for such records may be conducted under Privacy Act procedures. No record will be denied that is releasable under the FOIA.

(j) *Referrals.* (1) The OIG has the responsibility of protecting the identity of individuals who make protected disclosures of wrongdoing on the part of others, under the “Whistleblower Protection Acts”. When a FOIA requester has identified himself/herself as the “Whistleblower” in the matter for which records are being sought, in accordance with §295.7(b)(3) of this part, or the FOIA/PA Division can reasonably determine that the FOIA requester is the “Whistleblower”, the individual’s identity will continue to be

protected in all of the following circumstances involving referrals, except to the extent that such protection will impede the release of responsive records to the requester. In such event, the requester will be advised of the impedance and offered the option of allowing himself/herself to be identified solely for the purpose of obtaining maximum release of records responsive to the FOIA request. If the requester chooses to continue anonymity, the request will be processed only to the extent that will allow continued protection of the individual’s identity.

(2) The OIG will refer a FOIA request to another DoD Component or to a Government agency outside the DoD when the OIG has no records responsive to the request, but believes the other DoD Component or outside agency may have, and the other DoD Component or outside agency has confirmed that it holds the record. When the other DoD Component or outside agency agrees to the referral, the requester will be advised of the referral and that the OIG has no responsive records, with the following exceptions:

(i) If it is determined by the other DoD Component or outside agency that the existence or nonexistence of the record itself is classified, the OIG will inform the requester only that the OIG has no responsive record and no referral will take place.

(ii) If the record falls under one or more of the “Exclusions” under the FOIA (see appendix B of this part), as determined by the other DoD Component or outside agency, the OIG will advise the requester only that the OIG has no responsive record and no referral will take place.

(3) The OIG will refer a record, or portions of a record that holds but that was originated by another DoD Component or outside agency, or for a record that contains substantial information that originated with another DoD Component or outside agency, to that Component or agency (unless the agency is not subject to the FOIA) for a release determination and/or direct response to the requester. In any such case, direct coordination will be effected and concurrence obtained from the other Component or agency prior to the referral. A copy of the record will be provided to

the Component or agency with the referral, and the requester will be notified of the referral, consistent with any security requirements or "Exclusion" provisions of the FOIA. The OIG will not, in any case, release or deny such records without prior consultation with the other DoD Component or outside agency. If the requester is the "Whistleblower", the record or portion of the record will be provided to the DoD Component or agency, with a request for a release determination and return of the record to the OIG for response to the requester.

(4) The OIG will refer a FOIA request for a classified record that it holds, but did not originate, to the originating DoD Component or outside agency (unless the agency is not subject to the FOIA). If the record originated with the OIG but the classification is derivative, i.e., contains classified information that originated elsewhere and was incorporated in the OIG record, the record will be referred to the originating authority with a recommendation for release; or, after consultation with the originating authority, with a request for a declassification review and/or release determination and return of the record. If the requester is the "Whistleblower", the record will be provided to the originating authority with a request for a release determination and return of the record to the OIG for response to the requester.

(5) The OIG may also refer a request for a record that was originated by the OIG for the use of another DoD Component or outside agency, to that Component or agency with a recommendation for release, after any necessary coordination. The requester will be notified of such action consistent with any security requirements or "Exclusion" provisions of the FOIA.

(6) A FOIA request for investigative, intelligence, or any other type of record on loan from another DoD Component or outside agency to the OIG for a specific purpose will be referred to the DoD Component or outside agency that provided the records, if the records are restricted from further release and so marked. However, if for investigative or intelligence purposes, the outside Component or agency desires anonymity as determined through

coordination, the OIG will respond directly to the requester.

(7) A FOIA request for a record, or portions of a record, held by the OIG, that originated with a non-U.S. government agency that is not subject to the FOIA, will be responded to by the OIG.

(8) Notwithstanding anything to the contrary in this section, all requesters seeking National Security Council (NSC) or White House documents will be advised that they should write directly to the NSC or White House for such documents. Should the requester insist upon an OIG search for these records, the OIG will conduct an appropriate search pursuant to the FOIA. OIG/DoD documents in which the NSC or White House has a concurrent reviewing interest will be forwarded by the FOIA/PA Division to the Director, Freedom of Information and Security Review (DFOISR), Office of the Assistant Secretary of Defense (Public Affairs) (OASD(PA)), which shall effect coordination with the NSC or White House, and return the documents to the originating agency after NSC review and determination. The FOIA/PA Division will forward any documents found in OIG files that are responsive to the FOIA request to DFOISR, OASD(PA) for their coordination with the NSC or White House, and return to the OIG with a release determination for final processing of the request.

(9) On occasion, the OIG receives FOIA requests for General Accounting Office (GAO) documents containing OIG information. Even though the GAO is outside of the Executive Branch, and not subject to the FOIA, all FOIA requests for GAO documents containing DoD information received directly from the public, or on referral from the GAO, will be processed under the provisions of the FOIA.

(k) *Authentication of Records.* Records provided under this part will be authenticated, upon written request, to fulfill an official Government or other legal function. This service is in addition to that required under the FOIA and is not included in the FOIA fee schedule; therefore, a fee of \$5.20 may be charged for each such authentication.

(l) *Records Management.* FOIA records shall be maintained and disposed of in

accordance with Inspector General Defense Manual (IGDM) 5015.2,¹ “Records Management Program”.

(m) *Relationship Between the FOIA and the Privacy Act (PA)*. Not all requesters are knowledgeable of the appropriate statutory authority to cite when requesting records. In some instances, they may cite neither Act, but will imply one or both Acts. For these reasons, the following guidelines are provided to ensure that requesters receive the greatest amount of access rights under both Acts:

(1) Where requesters seek records about themselves which are contained in a PA system of records and cite or imply the PA, the OIG will process their requests under the provisions of the PA.

(2) Where requesters seek records about themselves which are not contained in a PA system of records and cite or imply the PA, the requests will be processed under the provisions of the FOIA, since they have no access under the PA.

(3) Where requesters seek records about themselves that are contained in a PA system of records and cite or imply the FOIA or both Acts, the requests will be processed under the time limits of the FOIA and the exemptions and fees of the PA. This is appropriate since greater access will generally be received under the PA.

(4) Where requesters seek agency records (as opposed to personal records) and cite or imply the PA and FOIA, or where requesters cite or imply only the FOIA, the requests will be processed under the FOIA.

(5) Requesters will be advised in the final responses to their requests why a particular Act was used in processing their requests.

(n) *Index and “(a)(2)” Materials*. (1) No order, opinion, statement of policy, interpretation, staff manual or instruction (except as indicated below) issued after July 4, 1967, which is not indexed and either made available or published, may be relied upon, used, or cited as a precedent against any member of the

public unless that individual has actual and timely notice of the contents of such materials. Such actual and timely notice may not be after-the-fact; i.e., after the individual has suffered some adverse effect. Materials identified as “(a)(2)” are:

(i) Final opinions, including concurring and dissenting opinions, and orders made in the adjudication of cases, as defined in 5 U.S.C. 551, that may be cited, used, or relied upon as precedents in future adjudications.

(ii) Statements of policy and interpretations that have been adopted by the agency and are not published in the FEDERAL REGISTER.

(iii) Administrative staff manuals and instructions, or portions thereof, that establish OIG policy or interpretations of policy that affect a member of the public. This provision does not apply to instructions for employees on tactics and techniques to be used in performing their duties, or to instructions relating only to the internal management of the OIG. Examples of manuals and instructions not normally made available are:

(A) Those issued for audit, investigation, and inspection purposes, or those that prescribe operational tactics, standards of performance, or criteria for defense, prosecution, or settlement of cases.

(B) Operations and maintenance manuals and technical information concerning munitions, equipment, systems, and foreign intelligence operations.

(2) Thus, materials considered to meet the preceding definition of the FOIA “(a)(2)” requirements will be made available for public inspection and copying upon written request to the address indicated in § 295.7(b)(1) of this part, unless such materials have been published and are offered for sale or subscription. Upon receipt of the request, arrangements will be made at a time convenient to both the requester and the OIG, for the review and copying. If the publishing activity is out of stock of the published, for sale material and does not intend to reprint, then the preceding procedure will apply to the published material as well.

(3) When appropriate, the cost of copying any “(a)(2)” materials will be

¹Copies may be obtained, if needed, from the Information and Operations Support Directorate, Publications Management Branch, room 420, 400 Army Navy Drive, Arlington, VA 22202-2884.

imposed upon the individual requesting the copy in accordance with chapter VI of DoD 5400.7-R (32 CFR part 286).

(4) The OIG will prepare an index of “(a)(2)” materials, or supplement thereto, arranged topically or by descriptive words rather than by case name or numbering system so that members of the public can readily locate material. Separate case name and numbering arrangements may be added for OIG convenience.

(5) The IG has determined that it is not practical nor feasible to prepare an index of the “(a)(2)” materials on a quarterly basis, nor to publish the annual “IG Publications Index” in the FEDERAL REGISTER because of the volume. This index is available to the public at no cost upon written request to: Acquisition and Resources Administration Directorate, Publications Management Branch, room 413, 400 Army Navy Drive, Arlington, Virginia 22202-2884. It may be necessary to deny all or portions of some documents listed in the index that fall within one or more exemptions of the FOIA.

(o) *Fees and Fee Waivers.* (1) Fees will be assessed under the FOIA as set forth in chapter VI of DoD 5400.7-R (32 CFR part 286).

(2) Requesters must indicate their willingness to pay fees in their initial FOIA request. If a waiver of fees is requested, a statement regarding their willingness to pay fees in the event a waiver or reduction of fees is denied is still required. Any requests not containing a statement regarding a willingness to pay assessed fees will not be processed and the requester will be so advised.

(3) Fees will not be required to be paid in advance of processing the request for release of the records requested except:

(i) When the requester is known to be in default of payment of fees incurred in connection with a previous request.

(ii) When the total amount of estimated fees assessable to the requester exceeds \$250.00 and waiver is not appropriate, a “good faith” deposit of half of the amount of the estimated fees may be required before completing the processing of the request, or providing the requested records, in the case of a requester with no history of payment.

Where the requester has a history of prompt payment, the OIG will notify the requester of the likely cost and obtain satisfactory assurance of full payment.

(4) When the OIG has completed all work on a request and the documents are ready for release, advance payment may be requested before forwarding the documents if there is no payment history on the requester. Where there is a history of prompt payment by the requester, the OIG will not hold documents ready for release pending payment.

(5) Fee waivers will be granted on a case-by-case basis when the OIG determines that waiver or reduction of the fees is in the public interest because furnishing the information is likely to contribute significantly to public understanding of the operations or activities of the OIG and the Department of Defense and is not primarily in the commercial interest of the requester. In any request for waiver of fees, the requester must provide sufficient information to enable the IDA to make a proper determination of whether or not the fees should be waived.

(6) In cases where the requester fails to provide sufficient persuasive information upon which to make a determination for waiver of the fees, the requester shall be so informed and given the opportunity to submit additional justification. Absent such justification, the requester may be required to pay fees appropriate to his/her category, if provision of the information is determined not to be in the public interest or benefit.

(7) Payments of fees must be by check or U.S. Postal money order made payable to the Treasurer of the United States. Cash payments cannot be accepted.

(p) *Appeals and Judicial Action.* (1) If the designated IDA declines to provide a requested record because the official considers it exempt from disclosure under one or more of the nine exemptions of the FOIA, that decision may be appealed by the requester to the designated Appellate Authority. The appeal should be submitted in writing by the requester within 60 calendar days after the date of the initial denial letter. In cases where incremental release

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actions have been taken on an initial request, the time for the appeal will not begin until the date of the last denial of release letter.

(2) A “no record” finding may be considered to be adverse, and if so interpreted by the requester, may be appealed using the normal OIG appeal procedures. The OIG will conduct an additional search of files, based on the receipt of an appeal to a “no record” response, as a part of the appellate process.

(3) All final decisions rendered on appeals will be made to the requesters in writing by the Appellate Authority, after consultation with the Office of General Counsel (OGC) representative to the OIG, and other appropriate OIG elements.

(4) Final determinations on appeals normally shall be made within 20 working days after receipt. The appeal will be deemed to have been received when it reaches the FOIA/PA Division, for administrative processing on behalf of the Appellate Authority. Misdirected appeals are to be referred expeditiously to the FOIA/PA Division.

(5) A requester will be deemed to have exhausted his/her administrative remedies after he/she has been denied the requested record or waiver/reduction of fees, by the designated Appellate Authority, or when the OIG FOIA/PA Division fails to respond to the request within the time limits prescribed by the FOIA, DoD 5400.7-R (32 CFR part 286) and this part. The requester may then seek judicial action from a U.S. District Court in the district in which the requester resides, has a principal place of business, in the district in which the record is located, or in the District of Columbia.

(6) Records that are denied on appeal shall be retained for a period of six years, in accordance with IGDM 5015.2,² “Records Management Manual,” to meet the statute of limitations of claims requirements.

APPENDIX TO § 295.5

EXTRACT

The material contained herein is an Extract of information from (Name of Original

²See footnote 1 to § 295.5(1).

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Document), which has been determined to be in the public domain. The remaining material not provided herein may be requested under the provisions of the Freedom of Information Act.

§ 295.6 Responsibilities.

(a) The Assistant Inspector General (AIG) for Investigations is responsible for the overall implementation and administration of the FOIA program in the OIG, and for the designation of the IDAs.

(b) The Director, Investigative Support is designated as an IDA and is responsible for the overall operation of the FOIA program in the OIG.

(c) The Assistant Director, FOIA/PA Division, Investigative Support Directorate is designated as an IDA and will:

(1) Serve as the point of contact on all FOIA matters for the OIG.

(2) Coordinate and respond to all requests received from the public for records in accordance with the policy established and procedures set forth in this part, and in all applicable DoD directives, regulations and instructions.

(3) Coordinate requests received from the public for records to the extent considered necessary, with the DFOISR, OASD(PA), other DoD Components, other Federal agencies, and other OIG elements.

(4) Arrange for the collection of fees are prescribed by the policy as established in this part.

(5) Maintain the FOIA case files in accordance with IGDM Manual (IGDM) 5015.2,³ “Records Management Program”.

(6) Recommend action to be taken on all appeals of fees, appeals of fee waiver denials, and appeals of denials to access of records requested, to the Appellate Authority.

(7) Review OIG publications to assure that those which meet the FOIA “(a)(1)” and “(a)(2)” requirements for publication in the FEDERAL REGISTER are prepared in proper form and transmitted promptly for publication in the FEDERAL REGISTER.

(8) Maintain copies of material required to be made available under the “(a)(2)” provisions of the FOIA for examination and copying by the public,

³See footnote 1 to § 295.5(1).